

**DEPARTMENT OF HOMELAND SECURITY  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2012-100**

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**FINAL DECISION**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application on March 15, 2012, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 7, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S INITIAL REQUEST AND ALLEGATIONS**

The applicant asked the Board to remove or correct certain comments in his officer evaluation report (OER) covering his service as the commanding officer of the CGC XXXX, a seagoing buoy tender home-ported in XXXXXX with a crew of 51 personnel, from May 1, 2009, to April 30, 2010. The disputed comments and his corresponding allegations and evidence are summarized below. He asked the Board to correct the OER before the CDR selection board convened in July 2012.

**OER Block 3:** "Insufficient CMD oversight monitoring & directing activity of supply dept. personnel resulted in DX WLB fuel account going in the red at the end of FY-09."

The applicant alleged that this comment is inaccurate. He stated that an investigation showed that "commonly accepted district practice and insufficient district policy contributed to the result." However, he alleged, the successful results of a financial and procurement compliance inspection conducted earlier and the cutter's receipt of an Operational Excellence Award for its performance during training in October 2009 rebut this comment. He alleged that "[t]here were no reasonably apparent indicators for me as Commanding Officer to dig into unit purchasing practices until this one instance."

- A "Supplement to Investigation of CGC XXXX's Routine Purchasing Procedures" dated February 19, 2010, notes that the investigation focused particularly on fuel purchases that

occurred on August 11, September 4, and October 27, 2009. The summary states that “cumulatively, the District X Budget Office, BSU Xxxxxx’s Reconcilers, and CGC XXXX are all to blame for the errors that took place on CGC XXXX’s fuel obligations. CGC XXXX was not completing the DD1149s to obligating their fuel purchases properly nor were they submitting them in a timely manner; however, there was also little to no oversight by District X or BSU Xxxxxx’s Reconcilers. District X also has no written policy for units that do not maintain their own fuel account, which is required by the Supply Policy and Procedures Manual.”

- A policy memorandum dated December 15, 2011, regarding the issuance of an Overall Operational Readiness Excellence (“E”) Award state that “[e]ligibility for the award demands day-to-day excellence as demonstrated through the success of the unit during operations and periodic evaluations conducted between scheduled training cycles.” The award “is intended to recognize cutters that achieve and maintain an exceptionally high degree of continuous readiness shipwide throughout the eligibility period as measured through two components: (1) performance during CART/TSTA training period and (2) assessments of other operational requirements from one TSTA until the next.
- Two messages to the cutter congratulate the command for their outstanding performance and “clean sweep” during Tailored Ships Training Availability (TSTA) from September 14 to October 2, 2009, and for receiving the “E” Award.
- An Administrative and Financial Compliance Inspection Report for the cutter, dated February 24, 2009 (two months before the start of the reporting period for the disputed OER), states that the cutter was at least satisfactory or better and compliant in all areas. Being “in compliance” means that “the unit meets the program’s intent and statutory requirements.” The report states that the cutter’s financial and procurement administration was overall “in compliance.” The cutter was found to be compliant in numerous respects and was complying with the Coast Guard’s spending rates of 50% by the end of the second quarter and 75% by the end of the third quarter, but a few negative points were noted. The report stated that “[t]he unit’s obligations or expenditures exceed its annual apportionment”; “[u]nreconciled transactions over 30 days old listed on the “Transactions Not Yet on PES Report” are not being reviewed and promptly corrected. ... An inaccurate ledger balance will impact the unit’s fiscal decisions”; and “PES errors and unresolved items are not recorded correctly in Finance and Procurement Desktop for timely transmission to FINCEN. Errors are not identified, analyzed for causes, documented, and forwarded for action to FINCEN.”

**OER Block 4:** “Award recommendations frequently required additional work, did not support level of awards.”

The applicant alleged that this comment is inconsistent with the mark of 4 he received for the performance category “Writing,”<sup>1</sup> which requires that an officer’s writing be “clear, concise,

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<sup>1</sup> Coast Guard officers are evaluated in a variety of performance categories, such as “Teamwork” and “Judgment,” on a scale of 1 (worst) to 7 (best). A middle mark of 4 means that the officer met the expected high standards of all Coast Guard officers for that category.

and logically organized. Proofread conscientiously. Correspondence grammatically correct, tailored to audience, and delivered by an appropriate medium. Subordinates' material reflected same high standards." In addition, the applicant alleged that the results of the various districts' Awards Boards are too unpredictable for anyone to claim that any given award proposal would not be successful. He noted that Awards Boards often require presenters to rewrite the award citations. The applicant stated that he submitted nominations for five awards during the reporting period for the disputed OER. Two were approved for the level of award proposed; one was approved for a lower level award than the one proposed; and two were denied without explanation. However, the applicant alleged that the decision-making by Awards Boards and the final approving authority is too subjective to warrant the criticism he received in this disputed comment.

In support of these allegations, the applicant submitted a DX Awards Tracking Form, showing all of the levels of approval an award nomination had to go through; a copy of the award citation he submitted for his First Lieutenant to receive a Commendation Medal; and the final memorandum forwarding an Achievement Medal, which is the next lower level medal, instead, for the First Lieutenant with no explanation.

**OER Block 5:** "Req'd prodding to hold subordinates accountable for low stds or irresponsible actions (Xxxxxxxx chart corrections & personnel actions)."

The applicant alleged that this negative comment contradicts the mark of 4 he received for "Directing Others," which required him to "set high work standards." The applicant alleged that as CO, he "continuously enforced the philosophy to take immediate action to correct discrepancies when discovered." He alleged that the Xxxxxxxx chart problem occurred because when the navigation division was noting discrepancies between a paper navigational chart and actual conditions, they accidentally used an outdated chart and so found and reported many more discrepancies than existed when actual conditions were compared to the most recent chart. The applicant stated that the mistake had no effect on operations and no disciplinary action was warranted. The applicant alleged that the comment is unwarranted in this regard because "[a]n honest attempt to correct a discrepancy is not a demonstration of irresponsibility."

Regarding the reference to "personnel actions" in this comment, the applicant referred the Board to his allegations about the disputed comment in block 8 (below).

**OER Block 5:** Requests removal of word "usually" from this comment: "OER's/EPEF's submitted on time, assigned marks usually met standards, ensured counseling provided required feedback."

The applicant alleged that the word "usually" makes this comment inconsistent with the mark of 4 he received for "Evaluations," which requires that the evaluation marks assigned by an officer on his subordinates' evaluations meet the written standards for those marks. The applicant complained that no justification for the word "usually" was included.

**OER Block 8:** "Approach to personnel actions during period generally indicated disconnect between self & Senior leadership ... correct decisions eventually reached."

The applicant alleged that this negative comment contradicts the mark of 4 he received for the category "Responsibility." He alleged that the comment suggests as the CO, he is not allowed to have a different opinion than his supervisors. He noted that no specific personnel action is mentioned. The applicant alleged that only two personnel actions attracted the attention of the District while he was CO. The first was the discharge of a crewmember whose urine tested positive for marijuana use, and the second involved inappropriate behavior on the part of some junior officers. The action stated that he took disciplinary action in accordance with policy in these cases and never conveyed any intention to do otherwise. However, he noted that neither his supervisor nor his reporting officer, who were stationed in Xxxxxx, were ever aboard the XXXX during the two years he served as CO, even though the XXXX was in Xxxxxx for a two-month period and his reporting officer did fly to Xxxxxx, the cutter's homeport, twice during those two years. Therefore, they never observed the crew on the cutter. The applicant alleged that he meted out discipline based on his intimate knowledge of the crewmembers and their circumstances. He called the disputed comment opinionated, unjustified, and not reflective of his actual performance.

**OER Block 10:** Requests removal of the underlined phrase from this comment: "Based upon shiphandling and tactical operations skills, has high potential for future success as WMEC XO or WMSL OPS with mentoring on personnel and administrative details."

The applicant alleged that this comment is unwarranted and rebutted by all of the evidence he submitted. He alleged that the compliance report, "E" Award, and "clean sweep" during TSTA training received by the XXXX during his tenure demonstrate his excellent performance in personnel and administrative matters and thus contradict the comment. The applicant alleged that the cutter received the "E" Award, denoting a full year of both operational and administrative excellence, through his leadership and attention to detail.

### **VIEWS OF THE COAST GUARD**

On August 8, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant only partial, minor relief by removing the word "usually" from the comments in block 5 of the disputed OER. In so doing, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC) and relied on sworn declarations from the three members of the applicant's rating chain, who prepared and reviewed the OER.

PSC recommended that the Board deny the requested relief except for the removal of the word "usually" from block 5. PSC noted that the applicant did not file an OER Reply to accompany and rebut the OER in his record or apply to the Personnel Records Review Board for correction of the disputed OER within a year of its validation.

Based on the rating chain's declarations, which are summarized below, PSC stated that it believes the rating chain performed their duties properly in accordance with policy. PSC noted that the entire rating chain supports the accuracy of the disputed OER.

Regarding the disputed comments in block 5, PSC stated that the first one is not inconsistent with the mark of 4 because it shows that the applicant did ultimately hold his subordinates accountable and thus met the standard. Regarding the word “usually,” PSC noted that the applicant’s supervisor, who wrote this comment, indicated in his declaration that he would not object to its removal. Therefore, PSC would not object to its removal.

PSC stated that it is clear from the application that the applicant has a different opinion of his own performance, but it “believes the disputed OER reflects a succinct picture of performance as viewed by the rating chain during the period of report.”

### ***Declaration of the Applicant’s Supervisor***

The applicant’s supervisor, who as the chief of the District’s Waterways Management Branch prepared the blocks 3, 4, and 5 of the disputed OER, stated that the XXXX’s fuel account did “go into the red” because the cutter’s DD-1149s were not timely submitted as stated in block 3. He alleged that when the DD-1149s were submitted, they contained “inconsistencies in dates, fuel quantity and signatures indicating they were not completed at the time of fuel purchase. ... It is fair to say that there were a number of people that could/should be held accountable for the fuel account going into the red; however, I cannot speak to how those people were held accountable, only personnel under my supervision ... A lack of published guidance was noted in the investigation, but it should be noted that there were a number of email and phone exchanges from the [District] staff to all three [of the buoy tenders under the supervisor’s supervision] requesting fuel estimates and the importance of keeping on top of the fuel account to ensure adequate funds were available as we neared Fiscal Year close-out. As I recall these exchanges began as once-a-month events in July and August, increasing in frequency ... to weekly events in September.” The other two buoy tenders complied with the requirements, but the applicant’s did not.

Regarding the disputed comment in block 4, the supervisor stated that he received award nominations from the COs and XOs of the buoy tenders and provided feedback on the quality of their submissions. Most took the feedback to heart and improved the quality of their submissions. However, for the applicant, the supervisor “reworked almost every award nomination” and “provided feedback via phone and email several times, including emailing excerpts from the Coast Guard Medals and Awards Manual ... describing the requirements and informing him how the DX Awards Board interpreted the criteria.” However, when the applicant’s submissions did not improve, the supervisor became frustrated and ultimately delegated review of the applicant’s submissions to his deputy branch chief and asked him “to provide an objective review and to return any packages that did not meet the requirements along with an explanation and a copy of the pertinent section of the Medals and Awards Manual.”

Regarding the first disputed comment in block 5, the supervisor stated that the XXXX submitted a Patrol Summary with comments about numerous discrepancies in the navigational charts for the Xxxxxxx. Two weeks later, the supervisor received a list of 38 or 39 discrepancies. His office compared them to the master charts and determined that all but two “could be accounted for with Notice to Mariner chart corrections and the misreading of the latitude and longitude of the insets contained with Chart xxxxxxx. Commandant and unit naviga-

tion standards require that charts be corrected to the latest Notice of Mariners.” The supervisor advised the applicant of their findings and requested “an immediate reply in case we were in error or missing critical information. After repeated prodding, I received a reply from the XXXX’s Operations Officer stating that it appeared they had not applied any of the NTM corrections.” The supervisor stated that had the XXXX’s navigators either used an updated chart or referred to an Air Positioning Report or a Federal Identification Document, as is common practice, the XXXX would have resolved the “discrepancies” themselves. The supervisor stated that the applicant “refused to hold any member of his bridge team accountable.”

In addition, the supervisor stated that during a trip to Xxxxxx for routine maintenance, the XXXX experienced a casualty to one of the main diesel engines. Upon arrival, it was discovered that the cutter “did not have enough lube oil to conduct a flush of the engine as the cutter had only sailed with a minimal amount of oil.” The Executive Officer asked the supervisor for \$26,000.00 to purchase lube oil. Further inquiry revealed that the cutter had purchased seventeen 55-gallon drums of lube oil in Xxxxxx before its departure but “‘stored’ them at the Defense Reutilization Marketing Office” on shore. The drums had disappeared when the crew went to retrieve them before getting underway. The applicant “would not accept responsibility nor hold subordinates accountable.”

Regarding the applicant’s complaint about the use of the word “usually” in block 5, the supervisor stated that he would not object to its removal. He made no other comment about this complaint.

Regarding the applicant’s allegations about the disputed comment in block 8, the supervisor stated that the applicant, as CO, certainly had the right to disagree with his chain of command, but the disputed comment accurately reflects the relationship between the applicant and his chain of command. The supervisor stated that on at least two occasions he and the reporting officer had a conference call with the applicant to convey the District’s concerns about “personnel actions or the lack of command responsibility and/or accountability with regard to personnel or administrative actions. I did not make decisions in a vacuum, not without consulting my chain of command. [The applicant] was informed that much of the tension could have been alleviated if he had kept an open dialogue with [the supervisor’s office] or the DX staff, rather than wait until he was called by the Chain of Command either because of perceived inaction or to find out what course(s) of action he was going to propose.”

Regarding the disputed comment in block 10, the supervisor stated that he would not comment because it was written by the reporting officer.

### ***Declaration of the Applicant’s Reporting Officer***

The applicant’s reporting officer (RO), who prepared blocks 7 through 10 of the disputed OER, was the District Chief of the Prevention Division. Regarding the disputed comment in block 3 of the OER, the RO said that he thinks it is “accurate, reasonable and appropriate.” He stated that the three buoy tenders “were given ample, repeated warning by their DX Program Manager to ensure their financial readiness for end of fiscal year closeouts, particularly for high cost expenditures such as large fuel purchases.” The other two buoy tenders responded timely

enough, but the XXXX's response was too late to prevent obligating the funds prior to the end of the fiscal year. Specifically, the XXXX did not promptly submit documentation of a \$103,509 fuel purchase on September 4, 2009, and the District had to scramble to obtain permission to reallocate funds to cover the purchase, which it did by reallocating multi-year funds from a buoy maintenance contract, which affected the entire District's Aids to Navigation program. Furthermore, the RO stated, the February 19, 2010 "Supplement to Investigation of CGC XXXX's Routine Purchasing Procedures," which the applicant submitted, shows there were long-standing, systemic procurement process problems on the XXXX. The RO stated that the document shows that the applicant's oversight and attention to detail were insufficient in this regard.

The RO noted that the applicant was given credit for the XXXX's receipt of the "E" Award and "clean sweep" in TSTA in block 3 of the disputed OER. "Receipt of this award for readiness in a broad range of criteria does not negate either the reality of persistent, serious purchasing irregularities onboard" the cutter or the impact of that problem on the District as a whole.

Regarding the disputed comment in block 4, the RO stated that the comment is accurate, reasonable, and appropriate because the award recommendations received from the XXXX "were frequently very poorly written and at an inflated, unrealistic and unsupported level of award" and the award citations did not significantly improve in response to the District's feedback. District staff had to rewrite the citations to ensure appropriate recognition of the cutter's crewmembers.

Regarding the first disputed comment in block 5, the RO stated that on multiple occasions, he and the applicant's supervisor had to spend a considerable amount of time on the phone with the applicant to convince him of the serious nature of some of his subordinates' actions. "Whether [the applicant] was erring on the side of excessive mercy toward his shipmates or whether he failed to grasp the seriousness of the actions of his crew, I cannot say."

The RO stated that one incident referred to indirectly in block 5 involved the sexual harassment of a female officer of another unit by male officers of the XXXX. One male officer had made repeated, unwanted physical contact with the female officer and laughed about it despite her protestations. At the time, the Service "was actively communicating and enforcing a zero tolerance policy toward this unacceptable behavior." When asked how he was going to hold his subordinates accountable, the applicant repeatedly argued that because the officers had apologized to the female officer and she did not intend to press charges, no action against them was warranted. The RO stated that the applicant "failed to appreciate the seriousness of the offense and voiced his reluctance to take any official action that might jeopardize the promotion and assignment potential of the XXXX officers involved in this ugly event." The applicant "had to be told point blank" that his officers' actions were unacceptable and that as their CO, he had an obligation to hold them accountable. The RO concluded that this disputed comment is accurate, reasonable, and appropriate.

Regarding the use of the word "usually" in block 5, the RO stated that whether the word makes the comment inconsistent with a mark of 4 is "a matter of semantics." The applicant's

“extreme reluctance” to hold his officers accountable for the sexual harassment described above in their own OERs “raised questions regarding [his] willingness to conform to the Coast Guard’s personnel evaluation processes and policies.”

Regarding the disputed comment in block 8 of the OER, the RO stated that it is accurate, reasonable, and appropriate, but that in retrospect he would reword it to say that the applicant “generally indicated disconnect between self and CG policies [instead of ‘Senior leadership’] ... correct decisions eventually reached.” He alleged that the reference to Senior leadership was intended to refer to the “Coast Guard’s Flag leadership setting service policy direction, not to the applicant’s supervisor and reporting officer.”

In response to the applicant’s claim that he took correct action when a crewmember’s urine tested positive for marijuana use, the RO stated that the applicant delayed initiating the discharge proceedings and was perceived to be “foot dragging” by the District’s Chief of Staff resulting from either a failure to recognize the seriousness of the offense or an unwillingness to hold the member accountable. Both the RO and the applicant’s supervisor had to impress upon the applicant the seriousness of the offense and the urgency of dealing with it. The applicant took action “only after vigorous, repeated prompting.”

Regarding the applicant’s complaint that his supervisor and RO were too remote and never boarded the cutter while he was in command, the RO stated that having himself commanded Sector Xxxxxx for three years, he is intimately aware of the challenges posed by having the District office located xxxxxxxxxxxxxxxx. The RO stated that he told the applicant before the applicant took command of the XXXX that because of the distance, “he needed to take the initiative to communicate early and often with the DX staff.” The RO and the supervisor “would often remain in the office late into the evening to converse with [the applicant] by telephone as Xxxxxx’s local time is a relative four hours behind that in Xxxxxx.” The RO stated that he and the applicant’s supervisor “often initiated dialog with [the applicant].” He alleged that any claim or insinuation that they did not make themselves available to him has no merit.

Regarding the disputed comment in block 10 of the OER, the RO stated that it is reasonable and appropriate. Although the XXXX’s operational performance was satisfactory under the applicant’s command, on administrative and personnel issues, he “required an inordinate amount of counseling and pointed task direction to (eventually) comply with Coast Guard policy and the expectations of senior operational commanders. Many of these problems “were indicative of a lack of adequate command oversight and attention to detail.” The RO alleged that the disputed OER gives credit to the applicant where it was due but also reflects areas in which his “performance was weak and might benefit from further coaching, counseling and mentoring.”

Regarding the applicant’s claim about inconsistencies between the negative comments and the marks of 4, the RO alleged that if there is any inconsistency it “raise[s] doubts about the validity of the numerical marks,” rather than the accuracy of the disputed comments. The RO claimed that all of the OER comments are accurate and appropriate and any inconsistency found between the comments and the numerical marks shows that the rating chain “perhaps erred on the side of generosity” in assigning the numerical marks.

### ***Declaration of the OER Reviewer***

The OER Reviewer, who was the District Chief of Staff, stated that he visited the XXXX and had specific knowledge of some of the issues presented in the disputed OER. He does not think the disputed comments in the OER are erroneous. The reviewer stated that the applicant's insufficient oversight of his supply personnel directly resulted in the deficit in the fuel account at the end of fiscal year 2009. Although the investigation identified other contributing factors, it does not refute the applicant's own responsibility.

The reviewer stated that he was the Chair of the Awards Board and knows that several award packages had to be returned to the applicant to provide sufficient supporting justification for the level of award requested. Therefore, the reviewer said, the disputed comment in block 4 is accurate.

The reviewer also supported the accuracy of the first disputed comment in block 5 based on what the applicant's supervisor and RO told him about the applicant's desire not to take action against his subordinates despite very clear Commandant policy. In one case, the reviewer himself called the applicant about "adherence to policy and required command actions." The reviewer stated that the disputed comment in block 8 is also accurate because he "personally had to engage with [the applicant] concerning his reticence to hold a member of his crew to the requirements of very specific Coast Guard policy. While he ultimately did process this member for discharge as required, it was not without significant engagement on the part of almost every level of his chain of command."

The reviewer stated that the purpose of block 10 is to provide an RO's subjective opinion of the reported-on officer's potential for future service. The fact that the applicant's operational performance was outstanding, did not negate the fact that his attention to detail and resistance to adhering to administrative policies and procedures "were somewhat lacking."

### ***JAG's Memorandum***

Based on PSC's memorandum and the rating chain's declarations, the JAG concluded that the applicant has not provided any evidence to suggest that the disputed OER comments are erroneous or unjust. The JAG noted that the rating chain strongly supported the accuracy of all but one ("usually") of the disputed comments in their declarations with detailed examples of the applicant's performance.

Regarding the use of the word "usually" in block 5, the JAG stated that because the rating chain did not justify the use of the adverb, the JAG agrees with PSC that it should be removed. However, citing *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992), the JAG argued that the rating chain's use of this word in the OER does not constitute a misstatement of a significant, hard fact and so did not render the OER erroneous or unjust.

The JAG argued that the applicant has failed to meet his burden of proof and has submitted insufficient evidence to rebut the presumption of regularity accorded the disputed OER. "While the supervisor and CG PSC did acquiesce to the redaction of the word 'usually,' this is a

minor change and does not affect the OER.” Therefore, the JAG stated that the redaction of the word does not justify removal of the applicant’s failure of selection for promotion by the CDR selection board that convened in July 2012. In addition, the JAG argued that because the applicant failed to prove that the Coast Guard committed a legal error, it is “logically impossible for him to make a prima facie showing of a substantial connection, or nexus, between the alleged errors and the [selection board’s] decision not to promote him ... Under these circumstances, it is unnecessary to conduct an analysis under the second prong of *Engels* or for the Government to show harmlessness.”<sup>2</sup>

### **APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On August 24, 2012, the Chair mailed the applicant a copy of the advisory opinion and invited him to submit a written response within 30 days. No response was received.

### **SUMMARY OF THE APPLICANT’S RECORD**

The applicant received three annual OERs as the CO of the XXXX. On the first, which covered his command from April 15, 2008, to April 30, 2009, his rating chain assigned him fourteen marks of 5 and four marks of 6 in the various performance categories and a mark in the fifth spot on the officer comparison scale, indicating that when comparing the applicant to all other officers of the same grade the RO had known throughout his career, the RO considered him to be an “Excellent performer; give toughest, most challenging leadership assignments.” The RO also “strongly” recommended the applicant for promotion “with peers.”

The disputed OER in this case is his second as the CO of the XXXX and it covers his performance from May 1, 2009, through April 30, 2010. It was prepared by the same officers who prepared the first one and contains the disputed comments along with many positive comments. The rating chain assigned the applicant seven marks of 4, six marks of 5, and five marks of 6 in the various performance categories and a mark in the fourth spot on the officer comparison scale, indicating that the RO considered him to be a “Good performer; give tough, challenging assignments.” The RO also recommended the applicant for promotion with his peers.

The third OER that the applicant received as the CO of the XXXX was prepared by an entirely new rating chain and covers his service through April 30, 2011. In this OER, the applicant received thirteen marks of 6 and five marks of 7 in the various performance categories and a mark in the fifth spot on the officer comparison scale. The new reporting officer “highly” recommended the applicant for promotion. The applicant received an Achievement Medal for his performance as the CO of the XXXX. The citation for the medal describes numerous successful operations.

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<sup>2</sup> Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), to determine if an applicant is entitled to the removal of a non-selection for promotion, the Board must answer the following two questions: “First, was the [applicant’s] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [he] would have been [selected for promotion] in any event?” Because the Coast Guard raised the issue, the Board will address it even though the applicant did not expressly request removal of the non-selection.

Following his departure from the XXXX, the applicant began serving as the xxxxxxxxxxxx xxxxxxxxxxxx xxxxxxxxxxxx of another Coast Guard district. On his OER for the period ending April 30, 2012, the applicant received twelve marks of 6 and six marks of 7 in the various performance categories and a mark in the sixth spot on the officer comparison scale, indicating that his reporting officer “[s]trongly recommended [him] for accelerated promotion.” However, according to ALCGPSC 110/132, the applicant was not one of the 129 (out of 187) in-zone LCDRs selected for promotion by the CDR selection board that convened in July 2012.

## APPLICABLE REGULATIONS

Article 10.A.1.b.1. of the Personnel Manual in effect in 2010 states that COs “must ensure accurate, fair, and objective evaluations are provided to all officers under their command.”

Article 10.A.4.c.4. provides the following instructions for Supervisors completing the first 13 marks on an OER (similar instructions are provided for Reporting Officers for completing the last 5 marks in Article 10.A.4.c.7.):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer’s performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer’s performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer’s performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

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d. In the “comments” block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary Supervisors, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. ...

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g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. ...

Article 10.A.4.c.8.a. states that on the comparison scale in an OER, a Reporting Officer “shall fill in the circle that most closely reflects the Reporting Officer’s ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known.

Article 10.A.4.c.9. states that block 10 on an OER should contain the RO’s comments regarding the reported-on officer’s “potential for greater leadership roles and responsibilities in the Coast Guard” and that the comments “reflect the judgment” of the RO.

Article 10.A.4.g. allows an officer to submit a reply to an OER to express his own views of his performance for inclusion in his record. Members of the rating chain may attach their own responsive comments to the OER Reply.

## FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.

2. The applicant alleged that several comments in the disputed OER are erroneous, unjust, and inconsistent with the numerical marks he received. The Board begins its analysis in every case by presuming that the disputed information in an applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>3</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."<sup>4</sup> When challenging an OER, an applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>5</sup> The Board will address the disputed comments in order as they appear in the OER.

3. **OER Block 3**: "Insufficient CMD oversight monitoring & directing activity of supply dept. personnel resulted in DX WLB fuel account going in the red at the end of FY-09."

The applicant alleged that this comment is inaccurate and unjust because an investigation showed that other factors contributed to the problem. He also alleged that the XXXX's Administrative and Financial Compliance Inspection Report dated February 24, 2009, and receipt of an "E" Award disprove the disputed OER comment and also misled him to feel confident about the cutter's purchasing practices because "[t]here were no reasonably apparent indicators for me as Commanding Officer to dig into unit purchasing practices until this one instance" at the end of fiscal year 2009.

The fact that the investigation into the XXXX's purchasing procedures identified more than one contributing cause of the fuel account overdraft does not mean that holding the applicant accountable for the problem was erroneous or unfair. The investigation revealed several shortcomings in the cutter's Supply Department and concluded that the usual procurement and reconciliation procedures "broke down" because the cutter's DD-1149s were not timely submitted. As the CO, the applicant's responsibility for the efficiency of the cutter was absolute

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<sup>3</sup> 33 C.F.R. § 52.24(b).

<sup>4</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>5</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

even if he had delegated duties to others.<sup>6</sup> Holding him accountable for the significant shortcomings in the Supply Department is neither erroneous nor unjust.

The Board also finds that the compliance report that the applicant relied on raised several concerns about the cutter's administrative and financial procedures, even though the cutter was found to be in overall compliance. The compliance report included negative comments about the status and timeliness of the cutter's financial documentation. Given the negative comments in the compliance report and the repeated warnings the XXXX received about late DD-1149s toward the end of fiscal year 2009, the Board finds that the applicant's rating chain reasonably concluded that he should have known that more oversight and direction were required and so ensured the prompt processing of the cutter's DD-1149s.

The Board disagrees with the applicant that the criteria for an "E" Award and the XXXX's receipt of that award because of its "clean sweep" in Tailored Ships Training Availability in October 2009 prove that his oversight and direction of Supply Department personnel were not lacking or that better oversight and direction would not have prevented the fuel account from "going into the red." The award is issued for operational excellence and not for administrative or financial excellence. Nothing in the criteria the applicant submitted or Chapter 3.B.8. of the Medals and Awards Manual says anything about a requirement for administrative or financial excellence.

The declarations of the rating chain member's also contain substantial support for the accuracy of the disputed comment in block 3 of the OER as they show that the XXXX received repeated warnings about filing timely DD-1149s. The Board finds that the applicant has not proved by a preponderance of the evidence that the disputed comment in block 3 is erroneous or unjust.

4. **OER Block 4:** "Award recommendations frequently required additional work, did not support level of awards."

The applicant alleged that this comment is inconsistent with the mark of 4 he received for the performance category "Writing"; that decisions about what level of award members should receive are so unpredictable that it is impossible to say whether any particular draft citation is insufficient to support a certain level of award; and that requiring additional work on awards citations is normal.

On an OER form, the written standard for a mark of 4 for "Writing" requires that an officer's writing be "clear, concise, and logically organized. Proofread conscientiously. Correspondence grammatically correct, tailored to audience, and delivered by an appropriate medium. Subordinates' material reflected same high standards." The Board finds that the disputed comment, even though uncomplimentary, does not directly contradict the written standard for a mark of 4 and so is not erroneous. The Board notes that block 4 also contains a positive comment about the applicant's well written press releases. Therefore, the Board finds that the comments in block 4 are sufficiently consistent with the assigned mark of 4 for "Writing" to comply with the requirement for consistency in Article 10.A.4.c.4.e. of the Personnel Manual.

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<sup>6</sup> Coast Guard Regulations, COMDTINST M5000.3B, section 4-1-2.

The applicant has not submitted sufficient evidence to prove his claims that the approved levels of awards are so unpredictable or arbitrary that the criticism of his writing in this regard is unjust or that the amount of redrafting required for his submissions was not unnecessarily high. The declarations of the rating chain show that the applicant was repeatedly advised of the standards used by the District's Awards Board in deciding the level of award to recommend, but he continued to submit draft citations that did not meet those standards. The Board finds that the applicant has not proved by a preponderance of the evidence that the disputed mark in block 4 is erroneous or unjust.

5. **OER Block 5**: "Req'd prodding to hold subordinates accountable for low stds or irresponsible actions (Xxxxxxxx chart corrections & personnel actions)."

The applicant alleged that this negative comment contradicts the mark of 4 he received for "Directing Others," which required him to "set high work standards." Regarding the reference to "personnel actions" in this comment, the applicant noted that a CO is allowed to have a different opinion about how personnel matters should be handled based upon his intimate knowledge of his crew and their circumstances and so his different opinion on such matters should not have been criticized in the OER. He alleged that his navigators' use of an outdated navigational chart was a simple mistake that did not reflect irresponsibility or warrant any negative repercussions for them and that he complied with Coast Guard policy by initiating the discharge of a member whose urine tested positive for marijuana use and by taking disciplinary action against junior officers for their inappropriate behavior. He alleged that he never refused to comply with applicable Coast Guard policies.

The comment that the applicant had to be prodded into holding his subordinates accountable does not directly contradict the written standard for a mark of 4 for "Directing Others" on an OER form, which states the following: "A leader who earned others' support and commitment. Set high work standards; clearly articulated job requirements, expectations and measurement criteria; held subordinates accountable. When appropriate, delegated authority to those directly responsible for the task." The evidence before the Board does show that on one occasion—when his navigators used the wrong chart for the Xxxxxxxx—the applicant refused to set a high standard and hold subordinates accountable—at least in the opinion of his rating chain. The Board does not believe that a single such discrepancy necessarily proves that his supervisor committed an error or injustice by assigning the applicant a mark of 4 for "Directing Others" or drafting the disputed comment. The written standard for a mark of 4 does not use absolute language (such as "always") so as to prohibit the assignment of the mark if the officer did not always meet the standards. The rating chain's declarations indicate that the applicant was usually prodded into holding his subordinates accountable for failing to meet high standards of performance. In addition, the mark of 4 for "Directing Others" is also supported in block 5 with a positive comment that his ability to motivate his crew resulted in "first-rate outcomes." Therefore, the Board is persuaded that the comments in block 5 are sufficiently consistent with the assigned mark of 4 to comply with the requirement for consistency in Article 10.A.4.c.4.e. of the Personnel Manual.

The rating chain's declarations amply support the accuracy and fairness of this disputed comment. The supervisor, RO, and reviewer can recall having to repeatedly "prod" the applicant to hold his subordinates accountable by taking action in accordance with policy when they committed misconduct. The fact that the applicant ultimately responded to their prodding by following the prescribed courses of action does not contradict the disputed comment. The Board finds that the applicant has failed to prove by a preponderance of the evidence that this comment is erroneous or unjust.

6. **"Usually":** The applicant asked the Board to remove the word "usually" from this comment in block 5: "OER's/EPEF's submitted on time, assigned marks usually met standards, ensured counseling provided required feedback."

The applicant alleged that the word "usually" is unsupported and makes this comment inconsistent with the mark of 4 he received for "Evaluations." The written standard for a mark of 4 in this category requires that the officer submit his own and his subordinates' evaluations on time; that he assign numerical marks by applying the written standards; that the evaluations be fair and concise; that the assigned marks conform with the written standards; that the evaluations contain "specific observations" of performance; and that they require little revision.

The applicant's supervisor, PSC, and the JAG stated that they would not object to the removal of the word "usually." The supervisor did not cite any specific examples of when the applicant assigned marks that did not meet the standards or claim that the word is inaccurate or misleading. The RO argued that whether the inclusion of the word makes the comment inconsistent with the written standard for a mark of 4 is a matter of semantics. The written standard for a middle mark of 4 does not require that an officer always assign marks perfectly in accordance with the written standards; it requires the officer simply to "assign[] marks against standards." However, the written standard does not require an officer's preparation of evaluations to be perfect but allows a few revisions. Therefore, the Board finds that the supervisor's use of "usually" in this comment is sufficiently consistent with the written standard for a mark of 4 to comply with the requirement for consistency in Article 10.A.4.c.4.e. of the Personnel Manual.

The fact that two years after the supervisor wrote this disputed comment, he was apparently unable to recall whether the applicant had always, rather than just usually, "assign[ed] marks against standards" does not persuade the Board that the term "usually" is misleading or unjust. The Board notes in this regard that the comment, as written, is presumptively correct<sup>7</sup> and that inaccurately assigned evaluation marks would be quite consistent with the applicant's failure to draft award recommendations with sufficient support for the level of the recommended award, as noted in block 4 of the disputed OER. Nor does the Coast Guard's lack of objection to the removal of "usually" from block 5 persuade the Board that its use is misleading, erroneous, or unjust since it was based on the supervisor's lack of objection.

The applicant complained that the word "usually" is not supported by a specific example—presumably, he means by an example of an inaccurately assigned numerical mark in an evaluation he prepared. However, the amount of space for comments on an OER form is quite limited. Article 10.A.4.c.4. states that comments should reflect "different aspects" of an officer's

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<sup>7</sup> 33 C.F.R. §52.24(b).

performance; “amplify and be consistent with the numerical evaluations”; and “identify specific strengths and weaknesses” of his performance. The Board finds that the disputed comment supporting the mark of 4 for “Evaluations” meets these requirements and that the lack of a description of a specific instance when the applicant assigned a mark that did not meet the written standards does not prove that the “usually” is erroneous or unjust. The Board concludes that the applicant has not proved by a preponderance of the evidence that the comment that his “assigned marks usually met standards” constitutes an error or injustice.

7. **OER Block 8:** “Approach to personnel actions during period generally indicated disconnect between self & Senior leadership ... correct decisions eventually reached.”

The applicant alleged that this comment is erroneous and unjust because it contradicts the mark of 4 he received for the category “Responsibility.” The written standard for a mark of 4 in this category states that the officer “[h]eld self and subordinates personally and professionally accountable. Spoke up when necessary, even when expressing unpopular positions. Supported organizational policies and decisions which may have been counter to own ideas. Committed to the successful achievement of organizational goals.” The Board sees no contradiction between the disputed comment and the mark of 4 for “Responsibility.” The written standard does not state that the officer must always agree with the Coast Guard’s or Senior leadership’s positions or policies and even notes that an officer may express an unpopular position and does not have to agree with policies. The written standard requires that an officer be committed to the achievement of organizational goals and support organizational policies and decisions even if he disagrees with them. The disputed comment does not show that the applicant failed to meet this standard. Moreover, Article 10.A.4.c.4.e. authorizes comments that reflect both strengths and weaknesses and does not state that only strengths can be mentioned when a mark of 4 or above is assigned.

The rating chain’s declarations strongly support the accuracy and appropriateness of this comment in block 8. The Board finds that the applicant has not proved by a preponderance of the evidence that the comment is erroneous or unjust or inconsistent with the written standard for the assigned mark of 4.

8. **OER Block 10:** The applicant asked the Board to remove the underlined phrase from this comment in block 10: “Based upon shiphandling and tactical operations skills, has high potential for future success as WMEC XO or WMSL OPS with mentoring on personnel and administrative details.”

The applicant alleged that this comment is unwarranted and rebutted by all of the evidence he submitted. He alleged that the compliance report, “E” Award, and “clean sweep” during TSTA training in October 2009 demonstrate his excellent performance in personnel and administrative matters and thus contradict the comment. However, as noted above, the compliance report clearly identifies shortcomings in administrative matters, and nothing in the criteria for an “E” Award expressly requires excellence in personnel and administrative matters. Nor has the applicant shown that excellent performance in personnel and administrative matters is a requirement for a clean sweep in TSTA. The OER itself and the rating chain’s declarations noted significant weaknesses in the applicant’s oversight and handling of certain personnel and

administrative details. The comment is appropriate given the purpose of block 10 comments under Article 10.A.4.c.9. of the Personnel Manual, and the RO is expressly allowed to exercise his own judgment in commenting on an officer's potential to fill more responsible positions. The Board finds that the applicant has failed to prove by a preponderance of the evidence that the disputed comment in block 10 of the OER is erroneous or unjust.

9. The applicant has not proved by a preponderance of the evidence that the disputed OER is adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>8</sup> Therefore, the Board finds no grounds for granting the requested relief in this case.

10. Although the applicant did not expressly request removal of his non-selection, his application clearly shows concern about the possibility of non-selection, and the Coast Guard addressed the matter in the advisory opinion, which was sent to the applicant. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), removal of a non-selection requires both the existence of a prejudicial error in the applicant's record when it was reviewed by the selection board and a finding that it is not unlikely that the applicant would have been selected if there had not been a prejudicial error in his record. When an officer shows that his record was prejudiced before a selection board by error, "the end-burden of persuasion falls to the Government to show harmlessness—that, despite the plaintiff's *prima facie* case, there was no substantial nexus or connection" between the prejudicial error and the failure of selection.<sup>9</sup> To void a failure of selection, the Board "need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded."<sup>10</sup> However, because the Board has not found any error or injustice in the disputed OER, there are no grounds for disturbing the applicant's non-selection for promotion by the July 2012 CDR selection board.

11. The Board has found no error or injustice in the disputed OER, including the use of the word "usually" in block 5. However, even assuming *arguendo* that the use of "usually" were deemed erroneous or unjust, the Board notes that its inclusion in the OER would not justify removal of the applicant's non-selection for promotion under the *Engels* test. The use of "usually" in block 5 is not prejudicial because it denotes at most the lack of perfection in the preparation of subordinates' evaluations, which is already quite obvious due to the mark of 4 (on a scale of 1 to 7) in the category "Evaluations." Given the mark of 4 for "Evaluations," the supporting comment indicating that the applicant usually (but not always) assigned accurate marks in his subordinates' evaluations cannot be considered prejudicial.

12. Accordingly, the applicant's request should be denied.

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<sup>8</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

<sup>9</sup> *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982); *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005).

<sup>10</sup> *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982).

**ORDER**

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

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Donna M. Bivona

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Andrew D. Cannady

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Francis H. Esposito